INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions	2
Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented	2
Nature of cause and of rulings below	2
Cases sustaining the jurisdiction of the Supreme Court of the United States	4
Decree and opinion of the District Court	5
Appendix—Findings of fact and conclusions of law	6

Table of Cases Cited

Assigned Car Cases, 274 U. S. 564	4
Board of Trade of Kansas City v. *United States*, 314 U. S. 534	4
Florida v. *United States*, 282 U. S. 194	4
Florida v. *United States*, 292 U. S. 1	4
Howard Hall Co., Inc., v. *United States*, 315 U. S. 495	5
McDonald v. *Thompson*, 305 U. S. 263	5
Mississippi Valley Barge Co. v. *U. S.*, 292 U. S. 282	4
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420	4
Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197	5
Union Stock Yard Co. v. *United States*, 308 U. S. 213	4
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402	4
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454	4
United States v. *Caroline Freight Carriers Corp.*, 315 U. S. 475	5
United States v. *Maher*, 307 U. S. 148	5

Page

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156 4
Virginian Ry. v. *United States*, 272 U. S. 658 4
Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268 4

STATUTES CITED

United States Code, Title 28:
Section 41, as amended 2
Section 44, as amended 2
Section 47 2
Section 47a, as amended 2
Section 345, as amended 2

Filed March 17, 1945

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action

No. 5610

ALABAMA HIGHWAY EXPRESS, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38, Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on March 5, 1945. The petition for appeal was presented and allowed on March 10, 1945, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Northern District of Alabama, Southern Division, entered March 5, 1945. By said de-

cree the Court ordered, adjudged, and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By the said suit plaintiff had prayed the Court to restrain, enjoin, and suspend the operation, execution, and the effect and enforcement of an order of the Interstate Commerce Commission (Division 5), entered July 27, 1944, in its joint report (mimeographed—not to be printed in full in the permanent series of motor-carrier reports of the Interstate Commerce Commission) in the proceedings entitled No. MC-71516 Alabama Highway Express, Inc., Common Carrier Application, by the terms of which the Interstate Commerce Commission denied in part the application of this plaintiff for a certificate of public convenience and necessity by so limiting the authority granted so as not to include the entire State of Alabama as base area of operations.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petitions, dated August 30, 1944 and September 8, 1944, praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument, or further hearing. The said petitions were denied by the Interstate Commerce Commission on November 7, 1944, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time.

The principal grounds stated in the complaint in this Court are (a) that the Interstate Commerce Commission acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in limiting the plaintiff's base area to less than the State of Alabama, and (b) that the Interstate Commerce Commission misapplied the law to the undisputed facts as shown by the orders of the Commission and the record in

this case. Said grounds are predicated principally upon the following errors of the Interstate Commerce Commission:

(1) In limiting plaintiff's base area to a sixty-five mile radius of Birmingham, Alabama.

(2) In not fixing the entire State of Alabama as plaintiff's base area.

The decision of the lower Court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission, merely because couched in the language of the statute, are sufficient in the absence of supporting findings of fact based upon evidence of record. This is directly contrary to well-recognized principles of judicial review. *Florida* v. *United States,* 282 U. S. 194. Accordingly, it is important that this decision be reviewed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States,* 314 U. S. 534.

Union Stock Yard Co. v. *United States,* 308 U. S. 213.

United States v. *Pan American Petroleum Corp.,* 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.,* 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States,* 292 U. S. 282.

Florida v. *United States,* 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States,* 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States,* 272 U. S. 658.

Western Paper Maker's Chemical Co. v. *United States,* 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States,* 162 U. S. 197.
McDonald v. *Thompson,* 305 U. S. 263.
United States v. *Meher,* 307 U. S. 148.
United States v. *Carolina Freight Carriers Corp.,* 315 U. S. 475.
Howard Hall Co., Inc. v. *United States,* 315 U. S. 495.

E. Decree and Opinion of the District Court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

LEO P. KITCHENS,
D. H. MARKSTEIN, JR.,
Attorneys for Plaintiff.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

CIVIL ACTION No. 5610

ALABAMA HIGHWAY EXPRESS, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendant*

Findings of Fact and Conclusions of Law

The above-styled cause came on for final hearing before this duly constituted three-judge Court on February 5, 1945, and was submitted for final decree upon the pleadings, the evidence, the arguments, and briefs of counsel for the respective parties. The Court makes and enters its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. On or about February 8, 1936, Alabama Highway Express, Inc., an Alabama corporation, filed its application with the Interstate Commerce Commission (hereinafter called the Commission) under Section 209(a) of the Interstate Commerce Act (49 U. S. C. A. 309(a)) for a "grandfather" permit authorizing operations as a contract carrier by motor vehicle in interstate or foreign commerce of general commodities, except explosives, to and from points in Alabama, Louisiana, Georgia, Mississippi, Maryland, Tennessee, Virginia, North Carolina, South Carolina, Florida, West Virginia, Pennsylvania, New Jersey, Kentucky, New York, Ohio, Michigan, Illinois, Missouri, and the District of Columbia; also, ocean freight received from all steamship lines coming into the Port of Mobile, Alabama, destined to points in Alabama, Mississippi, Georgia, Tennessee, Louisiana, and Florida, all over irregular routes. Upon said application, the Commission instituted a proceeding desig-

nated No. *MC-71516 Alabama Highway Express, Inc., Common Carrier Application.* Protests were filed by competing carriers by railroad and motor vehicle objecting to the issuance of the permit prayed.

2. Thereafter, on July 27, 1944, Division 5, of the Commission, issued and entered its report on reconsideration and order, which the Court adopts, by reference, as a part of these findings, wherein it found, among other things, that the applicant (plaintiff herein) on June 1, 1935, was, and continuously since that time, has been in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce (1) of general commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, dangerous explosives, commodities requiring special equipment, and commodities in bulk, over irregular routes; (a) between all points in Alabama within 65 miles of and including Birmingham, on the one hand, and, on the other, points in other states, which are set forth with particularity in the report; and (b) between Mobile, Alabama, on the one hand, and, on the other, all points in Alabama; (2) of household goods, as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, between Birmingham, Alabama, on the one hand, and, on the other, all points in Mississippi, Tennessee, Florida, Georgia, Louisiana, and Virginia over irregular routes.

3. Division 5 further found in its report on reconsideration, dated July 27, 1944, that the applicant (plaintiff herein) was, on July 1, 1935, and continuously since, has been, in bona fide operation in interstate or foreign commerce as a contract carrier by motor vehicle over irregular routes under individual contracts or agreements with persons (as defined in Section 203(1) of the Interstate Commerce Act) who operate retail stores, the business of which is the sale of food (1) of such merchandise as is dealt in by wholesale, retail, and chain grocery stores, and in connection therewith, equipment, materials and supplies used in the conduct of such business, between Birmingham, Alabama, on the one hand, and, on the other, all points in Alabama within the territory in that State described in said

report at foot note 9, and Aberdeen, Columbus, and West Point, Mississippi, and Columbia, Lawrenceburg, and Pulaski, Tennessee, and (2) of flour, canned goods and dried fruits from rail sidings at Decatur, Florence, Sylacauga, Alexander City, Anniston, Talladega, Gadsden, and Montgomery, Alabama, Aberdeen and Columbus, Mississippi, and Lawrenceburg and Pulaski, Tennessee, to points within 50 miles of each respective rail siding located within the territory described in footnote 9 of the report of July 27, 1944.

4. Division 5, in its report on reconsideration, dated July 27, 1944, further found that the holding by applicant (plaintiff herein) of the certificate and the permit would not be consistent with the public interest and with the national transportation policy declared in the Act and required the applicant to make an election either to divest itself of the common carrier or contract carrier operations.

5. On August 30, 1944, applicant (plaintiff herein) filed a petition for reconsideration of the order of July 27, 1944, and on September 8, 1944, it filed another such petition and on September 7, 1944, another such petition was filed by a protesting carrier, all of which were denied by the Commission on November 7, 1944.

6. The plaintiff in this action makes no complaint in respect of the report on reconsideration and order issued by the Commission on July 27, 1944, except in so far as the plaintiff is restricted to operations as a common carrier between points in a base area comprised of Birmingham, Alabama, and all points within 65 miles of that city, on the one hand, and, on the other, the points in other states, hereinbefore referred to in these findings. Plaintiff claims that the Commission should have granted authority to it to perform operations between all points in Alabama, on the one hand, and, on the other, the points in other states, hereinabove mentioned. The plaintiff does not question the correctness of the statements of fact found in the report of the Commission of July 27, 1944. Except for one exhibit received in evidence by the Commission, the evidence received by the Commission has not been offered or received in evi-

dence in this case and hence the findings of fact in the Commission's reports, for the purposes of this suit, must be taken as supported by substantial evidence.

7. The statements of fact and the findings and conclusions of the Commission, as set out in said report on reconsideration, are sufficient to support the Commission's order.

Conclusions of Law

1. This Court has jurisdiction of this suit to set aside an order of the Interstate Commerce Commission and of the parties thereto.

2. The proceedings before the Commission, which resulted in said report on reconsideration and order of the Commission, were within the lawful jurisdiction of the Commission, were made after due notice to all interested parties, a fair hearing, and upon substantial evidence.

3. The limitation upon the base area within the State of Alabama, to or from which the plaintiff may operate as a common carrier to or from points in other states, was and is warranted by the law and facts shown by the Commission's report on reconsideration.

4. The report and order of the Commission and the enforcement thereof will not deprive the plaintiff of any constitutional or legal right.

5. The plaintiff is not entitled to the relief it prays and this suit should be dismissed for want of equity.

Entered this the 5th day of March, 1945.

Leon McCord,
United States Circuit Judge;
T. A. Murphree,
United States District Judge;
Clarence Mullins,
United States District Judge.

Filed March 5, 1945

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

Civil Action No. 5610

ALABAMA HIGHWAY EXPRESS, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Order of Dismissal

The above-styled cause came on for final hearing before the duly constituted three-judge Court on February 5, 1945, and was submitted for final decree upon the pleadings and evidence consisting of Exhibit No. 29 filed at the hearing held on October 16 and 17, 1939, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on February 2, 1945, the arguments and briefs of counsel for the respective parties; and the Court having considered all matters pertaining to the action herein and having reached the conclusion that the complaint herein should be dismissed at the cost of the plaintiff, and having duly entered its findings of fact and conclusions of law:

It is, therefore, Ordered and adjudged that the complaint as amended in this cause and this action be and the same are hereby dismissed at the cost of the plaintiff. Execution may issue for the collection of the costs.

March 5th, 1945.

LEON MCCORD,
United States Circuit Judge;
T. A. MURPHREE,
United States District Judge.
CLARENCE MULLINS,
United States District Judge.